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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CITY OF LYNNWOOD,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 84-206

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of the Department of Ecology's refusal to concur in the City of Lynnwood's application for a waiver from the requirement to achieve effluent limitations based upon secondary treatment at its municipal sewage treatment plant, came on for hearing in Lynnwood, Washington, on April 8 and 9, 1985. Sitting as the Board were Lawrence J. Faulk (presiding), Gayle Rothrock, and Wick Dufford.

Appellant City of Lynnwood was represented by Patrick M. Curran, City Attorney. Respondent Department of Ecology was represented by Leslie Neller-moe, Assistant Attorney General.

1 Post-hearing briefs and argument were submitted, the final such
2 being received by the Board on July 9, 1985.

3 In the evidentiary hearing, witnesses wre sworn and testified.
4 Exhibits were admitted and examined. From the testimony heard and
5 exhibits examined, the Board makes these
6

7 FINDINGS OF FACT

8 I

9 Appellant City of Lynnwood (the City) is a municipal corporation
10 which owns and operates a sewage treatment plant on 2.7 acres of land
11 which discharges to Brown's Bay on Puget Sound in the State of
12 Washington. The plant currently provides only primary treatment.

13 II

14 Respondent Department of Ecology (DOE) is an agency of the State
15 of Washington, with responsibilities for administering the laws of the
16 state concerning water pollution prevention and control.

17 III

18 This case presents a very basic conflict: whether the treatment
19 of municipal sewage should be upgraded to secondary treatment, which
20 is technologically feasible, or whether enhanced primary treatment is
21 adequate if no known harm is being done to the biology and uses of the
22 receiving waters, and the quality of the receiving water is high.

23 The question is pre-eminently an issue of policy. The task of
24 this Board is to determine what the policy of the State of Washington
25 is on this matter as expressed through existing state law.

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Simply put, the DOE wants Lynnwood to upgrade its sewage treatment plant to secondary treatment. The City does not want to do it. At the heart of the dispute is the problem of cost.

IV

The history of efforts to combat water pollution in this country reflects this same clash between two theories of regulation: management based on receiving water quality and control of effluent at the point of discharge.

The effluent control approach is premised on the understanding that, most often, the pollutant removal achieved by one or more individual dischargers will result in water quality which is better than the limits described by water quality standards. In such a situation, there is room for new dischargers to use the same receiving medium without the occurrence of pollution, as presently defined. Moreover, assuming that knowledge of the effects of adding society's wastes to water is now imperfect, technology-based limits on effluent provide a hedge against unknown long-term adverse consequences of discharges which are not accounted for in present water quality standards.

V

On October 18, 1972, Congress overrode a presidential veto to enact Public Law 92-500, a comprehensive national program centered on the technology-based effluent control concept, to be imposed, principally, through a system of federal permits, entitled the National Pollutant Discharge Elimination System (NPDES).

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1 The Act provided for state administration of the federal permit
2 program where the laws and administrative resources of the state were
3 found adequate to the task. The State of Washington, through DOE,
4 qualified for and undertook this function, merging the NPDES permit
5 system with a pre-existing system of waste discharge permits under
6 state law alone.

7 VI

8 The Federal Water Pollution Control Act amendments of 1972
9 required the achievement of effluent limitations based upon secondary
10 treatment for publicly owned treatment works. At that time most
11 municipalities were discharging wastes receiving primary treatment or
12 less.

13 VII

14 The instant controversy is the outgrowth of a 1977 amendment to
15 the Federal law (now called the Clean Water Act) which revived the old
16 management by water quality approach for certain publicly owned
17 treatment works. This marked a significant federal departure from the
18 effluent control philosophy adopted in 1972 (and still in effect for
19 most municipalities and for industrial sources). In fact, the federal
20 goal enacted in 1972 (and still on the books) was the total
21 elimination of all pollutant discharges to navigable waters in the
22 nation by 1985.

23 The 1977 amendments to the Federal Act, included a new provision,
24 Section 301(h), which provided for waivers of the secondary treatment
25 requirement for qualifying municipalities discharging to marine

1 waters. The "marine waiver" was to take the form of an NPDES permit
2 issued directly by the United States Environmental Protection Agency
3 (EPA). Issuance would depend on meeting numerous statutory tests,
4 including criteria related to the quality of the receiving waters.

5 VIII

6 Section 301(h) allows EPA-issued waivers, with the concurrence of
7 the state in which the discharge occurs. The federal law provided no
8 standards for such concurrence, but EPA by rule provided that:

9 No section 301(h) modified permit shall be issued:...

10 (3) where such issuance would conflict with
11 applicable provisions of State, local or other
Federal laws or Executive Orders . . .

12 42 CFR 125.59(b)(3)

13 EPA, further, made the states themselves the judges of when issuance
14 of a "marine waiver" would conflict with the state law. Under 42 CFR
15 125.60(b)(2), each applicant must provide a "determination," signed by
16 the appropriate state agency, that the proposed modified discharge
17 will comply with applicable provisions of state law. If the state
18 does not provide such a "determination," the federal waiver process
19 ceases. 40 CFR 125.59(e)(3).

20 IX

21 While establishing new substantive requirements, the 1972 Federal
22 Act also brought into being a massive program of grants for the
23 construction of municipal treatment works. In the following ten years
24 publicly owned treatment plants across the nation were upgraded with
25 federal grants furnishing 75 percent of the cost. In this state,

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1 additional grant funds from state sources contributed 15 percent of
2 project costs, leaving only 10 percent to be funded from local sources
3 in the typical case.

4 X

5 In recent years the fountain of federal and state grant funds has
6 all but dried up. Now only a few projects each year can expect to
7 receive funds from either source. Municipalities are now asked to
8 plan for sewage treatment plant improvements on the basis that the
9 full cost will have to be born locally.

10 XI

11 Under the Federal Act, municipalities which do not qualify for a
12 waiver must still proceed to secondary treatment. The original
13 deadline of mid-1977 was first allowed to be extended to mid-1983, and
14 then, allowed to be extended again to mid-1988. Extensions can be
15 given if federal grant money was not made available in time to meet
16 the initial deadline. However, this linkage of treatment upgrade
17 requirements and the availability of grant funds under federal law
18 applies only to the timing by which secondary treatment must be
19 achieved. The substantive obligation to achieve this level of
20 treatment remains whether grant monies are ever received or not.

21 XII

22 In April 1977, the City and Alderwood Water District engaged an
23 engineering firm to prepare a facility plan for upgrading the sewer
24 system and treatment plant serving Lynnwood and environs. The
25 majority of the existing primary system has been in operation since

1 1963.

2 The facility plan was described as "the first step in a three-step
3 process required to complete wastewater treatment works with 75%
4 federal grant . . . and a 15% matching grant from the state of
5 Washington . . ." The second step was to be preparation of detailed
6 design plans and specifications, and the final step was to be
7 construction of the facilities.

8 XIII

9 The "Area Wide 201 facilities plan," published in September, 1977,
10 provided background information about population and land use,
11 examined applicable governmental regulations, analyzed present and
12 future wastewater characteristics, evaluated alternative treatment
13 processes and recommended a treatment system which would meet the
14 secondary treatment requirements and serve projected growth for twenty
15 years. The proposed improvements were planned to be operational in
16 1980, subject to revision depending on the availability of government
17 grants.

18 The plan recommended a secondary treatment process utilizing the
19 activated bio-filtration (ABF) process.

20 XIV

21 The facility plan also provided a financial plan showing estimated
22 project costs for a secondary treatment plant designed to handle 5.5
23 million gallons per day (MGD) on the average. Total costs, including
24 construction costs plus 5.4 percent for sales tax and 10 percent for
25 engineering, legal and administrative fees for the recommended

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1 treatment facilities in 1977 dollars were estimated at \$11,783,570.
2 Of this, \$10,605,213 was anticipated to be paid by federal and state
3 grants. This left a total local capital cost to be born by the City
4 of \$1,178,357. These figures were preliminary planning estimates, not
5 based on detailed engineering or design work and, therefore, subject
6 to a lesser degree of accuracy.

7 The plan, additionally, projected the total estimated annual
8 operation and maintenance cost. From these analyses, the construction
9 of new facilities were estimated to cause household user charges to
10 increase by approximately \$2.00 to \$2.50 per month.

11 XV

12 The plan revealed that space limitations at the Lynnwood treatment
13 plant site preclude certain secondary treatment alternatives, such as
14 aeration ponds and trickling filter. Sludge processing alternatives
15 were also reduced by space availability. However, the plan
16 demonstrates that the technology exists to achieve secondary treatment
17 at the present site, apparently without a significant impact on costs.

18 XVI

19 In 1979, the City applied to the Environmental Protection Agency
20 (EPA) for a Section 301(h) waiver.

21 XVII

22 By 1980, it had become apparent that Lynnwood's sewage treatment
23 plant was severely overloaded and failing to meet even expected
24 primary treatment levels. In October of that year, Department of
25 Ecology issued an enforcement order to the City forbidding further

1 extensions to its sewer system until the treatment plant was upgraded
2 sufficiently to meet primary treatment objectives. This had the
3 effect of qualifying the City for state grant assistance for an
4 interim upgrade project.

5 XVIII

6 On October 17, 1983, the EPA wrote to the City of Lynnwood
7 indicating that they (EPA) needed additional information to complete
8 the evaluation of the City's waiver application.

9 XIX

10 In April of 1984, DOE published a public document entitled, "State
11 of WASHINGTON Policy and strategy for Municipal Wastewater Management"
12 (Document WDOE 84-4). This publication announced the agency's
13 approach to the objective of upgrading municipal treatment works in an
14 age in which grant funds for most projects will either be limited or
15 non-existent.

16 Under the heading "policy" the department stated:

17 Responsibility for achieving compliance by the
18 earliest possible date rests with the municipality.
19 WDOE will provide financial and technical assistance
20 to the extent possible. However, lack of such
assistance does not excuse the municipality from
compliance. . . .

21 Compliance means achieving secondary treatment or
22 greater, even though there is a marine waiver
23 provision in the federal Clean Water Act [301(h)].
24 From the state perspective, marine waivers authorize
an interim level of treatment on the way to eventual
compliance with all known available and reasonable
methods of treatment (which has as its eventual
end-point, secondary treatment). . . .

1 The DOE, thus, enunciated a policy whereby its decision to concur or
2 not to concur in marine waiver cases depends on the level of
3 preparedness of a community to undertake a secondary treatment
4 project. Timing was made a critical factor.

5 XX

6 On April 16, 1984, EPA wrote to DOE requesting that it immediately
7 review all remaining 301(h) applications in the state and asking for
8 the state's determination on them as soon as possible.

9 DOE put a task force to work on a crash basis to comply with this
10 directive.

11 XXI

12 On July 20, 1984, DOE wrote to the City and advised of its refusal
13 to concur in the waiver application. The agency said that it could
14 not provide a determination that the proposed discharge will comply
15 with applicable provisions of state law."

16 The letter stated:

17 This conclusion is based on an evaluation of available
18 information and current conditions in light of
19 statutory requirements, including the provisions of
20 RCW 90.52.040, which requires wastes to be provided
21 with "all known, available and reasonable methods of
22 treatment" prior to discharge, "regardless of the
23 quality of the water of the state to which wastes are
24 discharged." The department has determined that
25 secondary treatment is "known and available," and is
26 normally "reasonable" unless compelling evidence to
27 the contrary is presented.

Among the criteria considered in determining
"reasonable methods of treatment" were (1) the status
of planning needed to proceed to secondary treatment,
(2) environmental/siting constraints, and (3)
economic factors. These criteria were evaluated
using the city's 1980 facility plan.

1 XXII

2 On August 20, 1984, the City, feeling aggrieved by this decision,
3 appealed to this Board.

4 XXIII

5 In October of 1984, the City of Lynnwood completed a \$7.3 million
6 upgrading and expansion of their primary treatment facility. Half of
7 this was paid for by a state grant, the other half from local funds,
8 most of which were raised by selling revenue bonds. The improvements
9 consisted of a new headworks facility, three new primary clarifiers, a
10 chlorine contact tank, installation of a diffuser on the outfall line,
11 and the upgrading of the sludge handling process and operations
12 facilities.

13 The expanded treatment facilities are designed for an average
14 annual daily flow of 4.5 MGD, and a peak flow of 11.6 MGD. These
15 design flow rates are changes from the original 301(h) application,
16 submitted in 1979, which proposed a 4.0 MGD average annual daily flow
17 facility for the improved discharge.

18 The change in the proposed treatment facility capacity from 4.0 to
19 4.5 MGD was required by the Washington State Department of Ecology to
20 meet the standard design life of 10 years for expansion projects.

21 Continued growth will require a capacity for average annual daily
22 flow of 5.5 MGD by 1993, whether or not secondary treatment is
23 constructed.

24 XXIV

25 In November of 1984, the City responded to EPA's request for
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1 additional information by submitting two volumes entitled "301(h)
2 secondary treatment waiver update" developed by the same engineering
3 firm which did the facility plan.

4 XXV

5 The first Department of Ecology criterion "status of planning
6 needed to proceed to secondary treatment" is not an issue in this
7 case. Since NPDES permits are for a term of five years, the
8 Department of Ecology conceives that planning is far enough along if
9 secondary treatment can be designed and constructed within five
10 years. Several of the City's witnesses acknowledged that Lynnwood is
11 ready now to proceed to secondary treatment from the planning
12 perspective.

13 XXVI

14 The second Department of Ecology criterion, "environmental/siting
15 constraints" is an issue in this case.

16 There was no evidence that locating the secondary plant at the
17 present site would violate any limitations relating the land use or
18 any substantive environmental restrictions. However, the topography
19 does present problems.

20 The existing treatment plant site is located on approximately 2.7
21 acres of land, severely restricted on the north, south and east by
22 steep hillsides. The west side of the plant site is bordered by the
23 Burlington-Northern Railroad and Puget Sound. The existing plant is
24 constructed on the westerly portion of the floor of a narrow ravine.
25 The narrow ravine bottom, steep side slopes and surrounding

1 single-family residential development are physical realities which
2 must be considered in designing the project.

3 The City contended that specific problems with this site should
4 make secondary treatment unreasonable at this site. They testified
5 that slide conditions, noise, odor from the sludge and land
6 constraints all increased the likelihood of environmental degradation
7 at the site. We, however, find that despite restricted citing
8 conditions, it is possible to construct secondary treatment at the
9 Lynnwood site without significant degradation of the environment.

10 The proposed secondary wastewater facility would occupy an area of
11 less than six-tenths of an acre of the site. The design and
12 construction will include architectural and landscaping considerations
13 to harmonize with the surroundings. The ABF process recommended will
14 use bio-filtration towers and a sludge handling, control and
15 operations building which should be, to a degree, screened off by
16 natural features. Except for these, no structures will exceed one
17 story.

18 Recent drainage and stabilization work has much reduced the danger
19 of slides. Consideration of sound transference and abatement will be
20 included in functional requirements. Sludge incineration techniques
21 can effectively control odors.

22 Thus, the suggested environmental problems are speculative. None
23 appears to be without a manageable engineering solution.

24 XXVII

25 The third criterion "economic factors" is the major focus of
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1 dispute.

2 Though some grant money might be made available, DOE's analysis of
3 economic reasonableness assumed the non-availability of any such funds
4 and looked at the project on the basis of 100 percent local financing.

5 Water quality impacts were not considered in DOE's assessment of
6 economic reasonableness. The presupposition was that the benefits
7 side of the ledger had already been taken care of as a matter of
8 legislative policy. Attention was given solely to the cost side.

9 The Department did no independent study. It relied on data
10 furnished by the City, on information in its own files, and on
11 formulae from EPA publications. DOE took the cost figures from the
12 1977 Lynnwood facility plan and attempted to update the cost of the
13 project to 1984 dollars. The result was a construction cost estimate
14 of \$15,035,531. A separate, somewhat lower estimate of the capital
15 costs was derived from EPA's handbook, "Construction Costs for
16 Municipal Wastewater Treatment Systems: 1973-1978."

17 From the updated cost figures DOE estimated the monthly
18 residential use charges which would be needed to pay for the project.
19 These charges were compared with charges actually being paid in
20 selected cities in the state, as well as with a figure calculated by
21 use of a formula used by EPA nationally to indicate what projects are
22 "high cost" projects for the purposes of grant funding.

23 Using these approaches, DOE decided that Lynnwood's project was
24 not unreasonably expensive to build at this time.

XXVIII

The City hired consultants to evaluate DOE's analysis and to prepare a financial forecast and rate impact analysis. The starting point for this work was an escalation of the construction cost numbers from the 1977 facilities plan to June 1984.

The result was an estimated construction cost for a 5.5 MGD secondary plant of about \$20 million. This includes clarifier and outfall costs not included in the 1977 facility plan, and also about \$400,000 in additional expense for slide protection owing to peculiarities of the site. Except for the last mentioned item, the increase over 1977 costs is not directly attributable to local conditions at Lynnwood's site.

XXIX

Residential users in Lynnwood are currently paying \$6.90 per month in sewer charges. Even without this secondary treatment project some rate increases can be anticipated.

XXX

Both the Department of Ecology and the City estimated the rate impact of the project. Department of Ecology estimated the monthly residential rate to be \$18.80 based on its update to 1984 of secondary treatment construction costs alone, and assuming 7.8% interest on revenue bonds. The City's experts projected user rates based on Lynnwood's entire sewage system capital improvement plan and included additional sums for the costs of borrowing and for fees for engineering, legal service and administration. The City used 10.5%

1 interest on revenue bonds. Discounting the City's highest projected
2 rate to 1984, the resulting figure is \$39.20 per month.

3 All of these rate projections are take-offs from preliminary cost
4 estimates. Because of this, all of the rate figures derived must be
5 seen, at best, as rough estimates.

6 XXXI

7 Applied to Lynnwood, the EPA "high cost" formula in 1984 dollars
8 yielded a hypothetical user charge of \$37.47 a month. This formula,
9 which involves multiplying the median household income by a fixed
10 factor is used as a national guideline in connection with grant
11 decisions. It provides a general indication of when a project is in a
12 cost range where alternative methods of accomplishing treatment
13 objectives should be looked at.

14 The City's projections showed a widening gap over time between the
15 EPA "high cost" figure and the user rates for Lynnwood. But the
16 former was increased using only a 4% annual inflation figure, while
17 the latter were the product of an assumed 6% inflation rate. Using 6%
18 for both, the figures would remain close.

19 XXXII

20 In its evaluation, DOE referred to an internal memorandum dated
21 September 27, 1983, which showed average residential sewer user rates
22 for a dozen Washington cities as exceeding \$20 per month (e.g.,
23 Bremerton, Port Orchard.) The memorandum showed one entity, Pierce
24 County, with charges totaling \$40 per month.

25 No attempt was made to compare Lynnwood with the various entities

1 listed in terms of system type or size, user population served or
2 municipal financial condition.

3 However, Department of Ecology's witnesses testified that well
4 over two hundred publicly owned treatment plants in Washington have
5 gone to secondary treatment already and that only about 25
6 dischargers--all on marine waters--remain at primary levels.

7 Of those applying to the agency for waivers, only two have been
8 granted on economic grounds, and those involved situations where
9 projected user costs were dramatically in excess of the EPA "high
10 cost" formula and of rates paid by other users in the state. In
11 Department of Ecology's view, requiring Lynnwood to go to secondary
12 treatment would ask no more of it than most other communities have
13 been asked to do.

14 Even on the basis of the cost and rate estimates furnished by the
15 City's experts, the agency stated it could find no compelling reason
16 to make an exception for Lynnwood.

17 XXXIII

18 The secondary treatment process utilizing the Activated
19 Bio-Filtration (ABF) process was selected because it will satisfy all
20 the requirements of the existing sewer system and the regulatory
21 agencies. The space requirements, energy needs, and operation and
22 maintenance tasks are less than the other treatment processes
23 considered. The Facility Plan lists the total estimated cost, the
24 yearly operation and maintenance cost, and the total annual cost for
25 each of the three treatment processes considered in this section. An

1 analysis of annual costs presented indicates that the most cost
2 effective process for secondary treatment at the existing treatment
3 plant site is that of utilizing the Activated Bio-Filtration Process.

4 XXXIV

5 Secondary treatment is both known and available. There is no
6 argument to the contrary. The technology has been in existence for
7 many years. It is in common use by industries and municipalities
8 across the nation. The expertise of several of the City's consultants
9 is in the design of various types of systems which will provide this
10 level of treatment. The Lynnwood facility plan evidences that the
11 technology is neither experimental nor exotic.

12 XXXV

13 Nothing in the record demonstrates that as a generic category,
14 secondary treatment involves prohibitive costs.

15 Moreover, the particular system type proposed for the City does
16 not appear to be an unusually expensive variety of secondary
17 treatment. In the facility plan the costs of alternative secondary
18 treatment systems are compared. The proposed system (ABF) compares
19 favorably in cost with the other possibilities.

20 XXXVI

21 Some evidence was presented by the City showing site-specific
22 factors which will add construction costs to the secondary treatment
23 plant proposed for Lynnwood. However, these extra costs were not
24 shown to render the expense of secondary treatment at Lynnwood
25 significantly beyond the normal cost spectrum. Nothing about the salt

1 water location was shown to make achieving secondary treatment more
2 costly than achieving the same pollutant reduction at a fresh water
3 location.

4 XXXVII

5 The potential dramatic effect of the secondary treatment project
6 on user charges is not attributable to the imposition of a technology
7 which is unusual or hard to get, or which has been shown from a
8 comparative standpoint to be extraordinarily expensive. The effect is
9 primarily attributable to the assumption, by all concerned, that no
10 grant funds will be available to reduce the amount of cost born
11 locally.

12 XXXVIII

13 DOE's experience is that cost estimates for projects initially
14 planned (as here) assuming 90 percent grant funding are significantly
15 higher than actual costs incurred if only 50 percent or less grant
16 funding is made available.

17 XXXIX

18 The City did not prove that it would be beyond its capability to
19 finance the proposed secondary treatment project at this time.

20 XXXX

21 Evidence concerning the water quality impacts of discharges from
22 both the City's present sewage treatment plant and the proposed
23 upgraded facility was the subject of a motion in limine offered at the
24 hearing. We received the evidence subject to a later ruling on its
25 admissibility.

1 We have admitted this testimony for the limited purpose of
2 determining that existing water quality of the receiving waters is
3 better than the limits described by applicable water quality
4 standards, and that secondary treatment would result in additional
5 pollutant removal. Beyond this, because of the conclusion set forth
6 below in Conclusion of Law IX, the Board did not consider any of the
7 water quality evidence presented in reaching its decision.

8 XXXXI

9 Any Conclusion of Law which is deemed a Finding of Fact is hereby
10 adopted as such.

11 From these Findings of Fact, the Board comes to these

12 CONCLUSIONS OF LAW

13 I

14 We conclude that the DOE's denial of concurrence is an appealable
15 order under chapter 43.21B RCW giving rise to a contested case.

16 Normally the level of treatment an entity must meet would be
17 imposed through effluent limits in a discharge permit, issued by the
18 state in satisfaction of the requirements of both federal and state
19 law. However, the 301(h) "waiver" process compels a variation in this
20 routine. The "waiver" process involves an application for a federally
21 issued permit to allow a relaxation in the mandate for secondary
22 treatment otherwise imposed by federal law. 33 USC 1311(b)(1)(B),
23 1311(h). But before federal evaluation of the application, the state
24 must decide that such federal issuance would not conflict with
25 applicable state law. 40 CFR 125.59(b)(3).

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1 If, as here, the state determines that there is a conflict, the
2 federal "waiver" process is aborted, and the state decision, in
3 effect, returns the applicant to the normal discharge permit track.
4 In so doing, the state decision of necessity answers a substantive
5 state law question. The matter determined is that state law requires
6 at least secondary treatment for discharges from the source in
7 question.

8 Such a decision is, we believe, a final order which this Board can
9 review. The Board has jurisdiction over these parties and these
10 issues.

11 II

12 This appeal involves state law only. No federal law issues are
13 raised. There is one encompassing question: Can the City of Lynnwood
14 under the law of Washington be permitted to continue discharging
15 wastes provided with less than secondary treatment?

16 This requires interpretation of the statutory formulation "all
17 known available and reasonable methods of treatment" (hereafter
18 called, the State Standard). No one argues that secondary treatment
19 is either unknown or unavailable. The dispute is over its
20 reasonableness.

21 III

22 The broad question of the case logically subdivides into three
23 subissues: (1) May water quality be considered in determining what
24 the State Standard requires? (2) Is the reasonableness of a treatment
25 method affected, as a matter of law, by the availability of federal or

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1 state grant funds to help pay for its installation? (3) If the answer
2 to subissues (1) and (2) is "no," is it reasonable to require at least
3 secondary treatment for Lynnwood's sewerage.?

4 IV

5 Consideration of subissue (1)--the water quality question--
6 requires an analysis of the history of the State Water Pollution
7 Control Act (hereafter called, the State Act), chapter 90.48 RCW, and
8 two related enactments: the Pollution Disclosure Act of 1971, chapter
9 90.52 RCW; and the Water Resources Act of 1971, chapter 90.54 RCW.

10 Such an analysis is set forth in our opinion in Bellingham v.
11 Department of Ecology and we adopt that reasoning and interpretation
12 here.

13 V

14 Two state measures adopted in 1971, a year before the overhaul of
15 the federal water pollution law, are at the heart of this case. These
16 are now codified as RCW 90.52.040 and RCW 90.54.020(3)(b),
17 respectively.

18 The first reads:

19 In the administration of the provisions of chapter
20 90.48 RCW, the director of the department of ecology
21 shall, regardless of the quality of the water of the
22 state to which wastes are discharged or proposed for
23 discharge, and regardless of the minimum water
24 quality standards established by the director for
said waters, require wastes to be provided with all
known, available, and reasonable methods of treatment
prior to their discharge or entry into waters of the
state. RCW 90.52.040.

25 The second reads:

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1 Waters of the state shall be of high quality.
2 Regardless of the quality of the waters of the state,
3 all wastes and other materials and substances
4 proposed for entry into said waters shall be provided
5 with all known, available and reasonable methods of
6 treatment prior to entry. Notwithstanding that
7 standards of quality established for the waters would
8 not be violated, wastes and other materials and
9 substances shall not be allowed to enter such waters
10 which will reduce the existing quality thereof,
11 except in those situations where it is clear that
12 overriding considerations of the public interest
13 would be served. RCW 90.54.020(3)(b).

14 From this plain language, the apparent purpose was to establish
15 unambiguously a technology-based system in this state. We hold that
16 the Legislature did so, and subsequent amendments have not changed
17 this basic feature of state law.

18 VI

19 The state permit system was extended to municipalities or public
20 corporations operating sewer systems in 1972. Section 1, chapter 140,
21 Laws of 1972 ex.sess. In adding these entities to the system, the
22 Legislature stated:

23 . . . this section is intended to extend the permit
24 system of RCW 90.48.160 to counties and municipal or
25 public corporations and the provisions of . . . RCW
26 90.52.040 shall be applicable to the permit
27 requirements of this section. RCW 90.48.162.
(Emphasis added.)

28 Thus, all municipalities were explicitly placed within the reach of
29 the terms of RCW 90.52.040 as of 1972.

30 VII

31 In 1973, the Legislature amended a state law provision granting
32 general power to participate in federal programs and provided a

1 detailed grant of power to issue permits satisfying requirements of
2 the new federal NPDES system. Section 1, chapter 155, Laws of 1973;
3 RCW 90.48.260. The amendment stated, in part:

4 ...the powers granted herein include...[c]omplete
5 authority to establish and administer a comprehensive
6 state point source waste discharge or pollution
7 discharge elimination program which will enable the
department to qualify for full participation in any
national waste discharge or pollution discharge
elimination permit system...

8 To the extent that this amendment may have added to existing
9 substantive law, it must have firmly established the State Standard as
10 a technology-based treatment provision. At the time such was the
11 exclusive nature of the federal standards, which as to municipalities,
12 called expressly for effluent limitations based upon secondary
13 treatment. Section 301(b)(1)(B); 33 USC 1311(b)(1)(B).

14 Another section of the 1973 amendments, codified at RCW
15 90.48.262(1), drives the point home even more forcefully:

16 The permit program authorized under RCW
17 90.48.260(1) shall constitute a continuation of the
18 established permit program of RCW 90.48.160 and other
19 applicable sections within chapter 90.48 RCW. The
20 appropriate modifications as authorized in this 1973
amendatory act are designed...to insure that the
state permit program contains all required elements
of and is compatible with the requirements of any
national permit system.

21 Compatibility in 1973 meant that the state system had to demand the
22 appropriate technology, notwithstanding the absence of identified
23 water quality problems.

24 VIII

25 The "marine waiver" provisions of Section 301(h) of the federal
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1 statute, adopted four years later in 1977 [33 USC 1311(h)], have no
2 state law analogue. As noted in 1973, the state law was consciously
3 altered to insure that it was at least as stringent as the 1972
4 version of the federal statute. However, the State Act has never
5 subsequently been amended to mirror the 1977 weakening of the federal
6 scheme for marine discharges by municipalities.

7 Section 510 of the Federal Act, 33 USC 1370, authorizes states to
8 enforce standards which are more stringent than those imposed
9 federally. The federal scheme does not require states to weaken their
10 standards when the federal government weakens its standards and our
11 Legislature has not done so.

12 RCW 90.48.260 has been amended twice since 1973. In 1979 the
13 words "as amended" were inserted after "Federal Water Pollution
14 Control Act." Section 1, chapter 267, Laws of 1979 ex.sess. In 1983,
15 the term "Federal Water Pollution Control Act" was replaced with
16 "federal clean water act." Section 1, chapter 270, Laws of 1983. The
17 most that can be deduced from these simple changes is that our
18 Legislature intended the state to pick up the authority to comply with
19 any new federal requirements which may have been added by amendments
20 to the federal act. But, nothing appears in these terse changes
21 which, in any way, indicates a conscious legislative decision to
22 retreat from the technology-based approach to treatment. Nothing
23 distinguishes between the treatment of discharges to salt water and
24 other discharges. Nothing suggests a separate standard to be applied
25 to municipalities as opposed to commercial and industrial operations.

1 Section 301(h) does not impose new requirements for states
2 administering the federal act. It creates an optional procedure
3 which states may choose to reflect in state law or not. The State of
4 Washington has not chosen to adopt a "marine waiver" exception to the
5 technology-based State Standard.

6 IX

7 We, therefore, conclude that the State Standard as expressed in
8 currently effective legislation calls for the imposition of methods of
9 treatment based on technology and that, in the instant case, water
10 quality considerations are irrelevant to the selection of the
11 technology to be imposed.

12 We need not decide if water quality considerations might be
13 relevant under state law where the discharge is to severely degraded
14 waters or where existing water quality or water quality standards
15 would be exceeded absent extraordinary treatment efforts. Here the
16 existing quality is high and the imposition of secondary treatment
17 would result in additional pollutant removal. Under such
18 circumstances, water quality considerations have no place in the
19 technology selection process.

20 X

21 We reject the notion that RCW 90.52.040 rules out only
22 considerations of existing water quality, but not of the effects of
23 proposed discharges in the process of technology selection. To look
24 at water quality effects without looking at existing water quality
25 would be virtually impossible. Moreover, such a reading would, in

1 practice, make water quality the driving force in choosing the levels
2 of treatment to be achieved. This is precisely the opposite of what
3 the legislative evolution of the State Standard points to. It is an
4 interpretation undercutting the whole concept of a technology-based
5 system and would render illusory the attempts to make state law
6 conform to the 1972 federal act. We decline to adopt it.

7 XI

8 There is no conflict between RCW 90.52.040 and RCW 90.54.020(3)(b)
9 (quoted in full in Conclusion V). Both passed in the same session and
10 should be construed as in the same spirit and actuated by the same
11 policy. Daviscourt v. Peistrup, 40 Wn. App. 433, _____ P.2d _____
12 (1985).

13 RCW 90.54.020(3)(b) supplements the State Standard with a
14 non-degradation policy which arguably could require more stringent
15 technology than ordinarily necessitated by the Standard. Where, as
16 here, degradation is not threatened, the subsection does not make
17 water quality relevant to the choice of technological alternatives.

18 XII

19 The State Act requires that a permit be obtained before wastes are
20 discharged into the waters of the state. RCW 90.48.160, 90.48.162.
21 The waters of Browns Bay are waters of the state. RCW 90.48.020.

22 RCW 90.48.180 provides, in pertinent part:

23 The [DOE] shall issue a permit unless it finds that
24 the disposal of waste material as proposed in the
25 application will pollute the waters of the state in

1 violation of the public policy declared in RCW
2 90.48.010. The [DOE] shall have authority to specify
3 conditions necessary to avoid such pollution in each
4 permit under which waste material may be disposed of
5 by the permittee:

6 Water quality standards represent the determination of DOE as to what
7 constitutes pollution. Centralia v. DOE, PCHB No. 84-287 (1985); RCW
8 90.48.040, 90.48.035. Thus, no waste discharge permit may be issued
9 at all if the disposal of wastes as proposed would violate water
10 quality standards.

11 However, this does not mean that water quality considerations
12 became relevant to the level of treatment to be imposed when both
13 existing and predicted water quality is better than the polluted
14 level described by water quality standards. The imposition of a
15 technology-based treatment standard under these circumstances is
16 wholly consistent with RCW 90.48.180.

17 Moreover, under the statutory scheme as a whole, the power to
18 specify conditions is not limited to those "necessary to
19 avoid...pollution." Conditions which will do much better than that
20 are also authorized. Were this not so, RCW 90.52.040 and RCW
21 90.54.02093)(b) would be meaningless.

22 XIII

23 The conclusion we reach on the water quality issue, as a matter of
24 state law, is consistent with decisions concerning treatment
25 requirements of the federal act. Except where water quality
26 considerations may have been made expressly applicable by the statute,
27 they have been held an improper subject of consideration in analyzing

1 requests to reduce the level of treatment required. See Crown Simpson
2 Pulp Co. v. Castle, 642 F.2d 323 (9th Cir. 1981); Appalachian Power v.
3 EPA, 671 F.2d 801 (4th Cir. 1982).

4 XIV

5 This brings us to subissue (2)--the relevance of grant
6 availability. As with water quality, the non-availability of grant
7 assistance has been held irrelevant to the substantive duty to meet
8 specified levels of treatment under the federal act, except where
9 explicitly made applicable in the statute. State Water Control Board
10 v. Train, 559 F.2d 921 (4th cir. 1977).

11 We adopt the same analytical approach to this question as a matter
12 of state law. Nothing in chapter 90.48 RCW or in any related statutes
13 suggests that the duty to provide the appropriate technology is in any
14 way dependent upon whether federal or state grant assistance will be
15 provided. Nothing suggests that the reasonableness of a particular
16 level of treatment is connected with whether the costs of a project
17 are spread to the taxpayers of the nation or of the state rather than
18 paid solely by the local citizens directly served.

19 Therefore, we conclude that legally there is no linkage in law
20 between grant fund availability and the level of treatment which may
21 be required. This is the interpretation adopted by DOE in their 1984
22 "State of Washington Policy and Strategy for Municipal Wastewater
23 Management." As the construction of the responsible agency, this view
24 is given great weight. Pedersen v. Department of Transportation, 25
25 Wn.App. 781, 6711 P.2d 1293 (1980); Weyerhaeuser v. DOE, 86 Wn.2d 310,

1 545 P.2d 5 (1976).

2 XV

3 Finally, we turn to subissue (3)--the general question of
4 reasonableness. Since neither water quality nor the availability of
5 grant funds may be considered in the selection of treatment
6 technology, what constitutes reasonableness under the State Standard
7 is a limited inquiry.

8 In 1983 DOE posed the following question to the Attorney General:

9 Under state law may a municipality discharge wastes
10 from its sewerage system into Puget Sound or other
marine waters, without providing secondary treatment?

11 The answer is set forth in AGO 1983 No. 23, a formal opinion
12 construing the State Standard. The core of the response is as follows:

13 The precise level of treatment required by those
14 general standards involves, primarily, engineering
15 determinations; i.e., as to what treatment methods
16 are "known," what treatment methods are "available,"
17 and what treatment methods are "reasonable" with
18 respect to the particular installation in light of
19 the factual circumstances surrounding it. To make
these determinations a review must be conducted by
20 the department of existing engineering technologies
in order to enable it to decide which methods of
treatment--including but not limited to "secondary
treatment" as above defined--are suitable with
respect to the waste situation involved in the
particular case.

21 DOE's response was to make a generalized engineering determination,
22 expressed in its municipal strategy document, that secondary treatment
23 is ultimately required of all municipalities by the State Standard.
24 However, it provided for case-by-case evaluation of each municipal
25 discharge to determine if the generalized determination is appropriate

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1 for that source at the time the question is asked. Thus, in its
2 denial of concurrence here, DOE stated that secondary treatment is
3 "normally 'reasonable' unless compelling evidence to the contrary is
4 presented."

5 This approach essentially establishes a generic treatment level as
6 appropriate for the entire class of municipal dischargers and, then,
7 allows for a kind of variance from this level on a showing of
8 "compelling evidence." This decisional model is similar to the
9 approach taken by EPA in requiring a showing of "fundamentally
10 different" factors affecting an industrial discharge before allowing
11 it to vary from treatment requirements set on a category-wise basis.
12 See EPA v. National Crushed Stone Association, 449 U.S. 64, 66 L.Ed.
13 2d 268, 101 S. Ct. 295 (1980).

14 We conclude that, in this case, the technique of analysis used by
15 DOE is consistent with the State Act.

16 XVI

17 As to factors bearing on reasonableness, DOE considered three:
18 (1) planning status, (2) environmental or siting constraints, and (3)
19 economics. Except for those matters we have concluded are irrelevant;
20 i.e., water quality and grant availability, there is no contention
21 that DOE failed to evaluate any factors it was legally obliged to
22 consider. Thus, we limit our inquiry to whether the agency rightly
23 decided the reasonableness question in light of the factors it did
24 consider.

XVII

Evidence was presented by the City showing siting constraints which narrow the range of choices for the secondary treatment plant at Lynnwood and present some risk of environmental degradation. However, these problems were not shown to be insurmountable and these risks were not shown to be significant. We conclude that the requirement for secondary treatment is not unreasonable in light of environmental or siting problems. DOE's reasonableness determination, thus, rises or falls on the "economics" consideration.

XVIII

The economic aspect of the reasonableness criterion of the State Standard is, we conclude, defined by two propositions: (1) whether secondary treatment for Lynnwood would involve significantly greater costs than for others obliged to obtain the same levels of treatment, and (2) whether secondary treatment is within the economic ability of the source to meet the costs of treatment.

EPA's refusal to consider the second of these propositions in industrial variances was upheld in National Crushed Stone Association, supra. But, underlying this conclusion was the realization that a single plant unable to come up to industry-wide standards can simply cease operations. This is a luxury municipal sewage treatment facilities do not enjoy. The sewage must go some place. Therefore, in interpreting the state law requirement for reasonableness as to municipalities, we think it is appropriate to include the "ability to pay" factor. Cf. Weyerhaeuser v. Southwest Air Pollution Control

1 Authority, 91 Wn.2d 77, 586 P.2d 1163 (1978).

2 Under the evidence, it is clear that building a secondary
3 treatment facility would be costly for the City and for the citizens
4 served. However, neither significantly greater comparative project
5 costs nor costs beyond the City's ability to bear were shown on the
6 record made to this Board. Borrowing from federal terminology there
7 is nothing "fundamentally different" about the Lynnwood project.

8 XIX

9 Under the facts of this case, secondary treatment was not shown to
10 fall outside the reasonableness criterion of the State Standard.

11 Therefore, we hold that DOE was correct in refusing to concur in
12 the City's marine waiver application. Such a waiver would conflict
13 with applicable provisions of state law.

14 XX

15 In reaching our conclusion in this case we disclaim any intention
16 of rendering personal views on what the state law ought to be in
17 relation to marine waivers. Our opinion is limited to setting forth
18 what we believe the law of Washington is on the subject. Whether the
19 law should be retained in its present form or changed is a broad
20 question of policy, properly addressed to the Legislature.

21 XXI

22 Any Finding of Fact which is deemed a Conclusion of Law is hereby
23 adopted as such.

24 From these Conclusions of Law the Board enters the following
25

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ORDER

The non-concurrence decision of DOE announced in its letter to the City dated July 20, 1984, is affirmed.

DONE this 4th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD

(See Concurrent Decision)
LAWRENCE J. FAULK, Chairman

Gayle Rothrock
GAYLE ROTHROCK, Vice Chairman

Wick Dufford
WICK DUFFORD, Lawyer Member

1 LAWRENCE J. FAULK - CONCURRING OPINION

2
3 I write separately because even though I reluctantly concur with
4 the result reached by the majority, I wish to emphasize some points
5 not discussed in that opinion.

6 The result reached by this Board is unfortunate but is required by
7 the law of the state of Washington.

8 I WATER QUALITY

9 RCW 90.52.040 reads:

10 In the administration of the provisions of
11 chapter 90.48 RCW, the director of the department
12 of ecology shall, regardless of the quality of the
13 water of the state to which wastes are discharged
14 or proposed for discharge, and regardless of the
15 minimum water quality standards established by the
16 director for said waters, require wastes to be
17 provided with all known, available, and reasonable
18 methods of treatment prior to their discharge or
19 entry into waters of the state. (Emphasis added).

20 This section of the law says clearly that whether the receiving
21 water quality is excellent or very poor makes no difference as to what
22 treatment method is required.

23 Lynnwood's water has been analyzed by both state and city
24 experts. The result is that Lynnwood's water quality at its sewerage
25 discharge point was of the highest quality according to state
26 standards and that water quality and marine life would not be
27 adversely affected should the Lynnwood treatment plant continue to
utilize upgraded primary treatment and not secondary treatment.
(Heinle, Roth, Crecelius-Jahola testimony.)

1 Clearly, in my view, if this Board could have taken into account
2 the quality of the receiving water, secondary treatment would not have
3 been required for the City of Lynnwood.

4 The federal Clean Water Act provides for a waiver of the secondary
5 treatment requirement for publicly owned treatment plants imposed by
6 subsection 301(b)(1)(B) of the Act where such plants discharge to
7 marine waters.

8 Federal Clean Water Act 301(h) reads:

9 (h) The Administrator, with the concurrence of
10 the State, may issue a permit under section 402 which
11 modifies the requirements of subsection (b)(1)(B) of
12 this section with respect to the discharge of any
13 pollutant in an existing discharge from a publicly
14 owned treatment works into marine waters, if the
15 applicant demonstrates to the satisfaction of the
16 Administrator that--

17 (1) there is an applicable water quality
18 standard specific to the pollutant for which the
19 modification is requested, which has been
20 identified under section 304(a)(6) of this Act;

21 (2) such modified requirements will not
22 interfere with the attainment or maintenance of
23 that water quality which assures protection of
24 public water supplies and the protection and
25 propagation of a balanced, indigenous population
26 of shellfish, fish and wildlife, and allows
27 recreational activities, in and on the water;

(3) the applicant has established a system
for monitoring the impact of such discharge on a
representative sample of aquatic biota, to the
extent practicable;

(4) such modified requirements will not
result in any additional requirements on any
other point or nonpoint source;

(5) all applicable pretreatment
requirements for sources introducing waste into
such treatment works will be enforced;

1 (6) to the extent practicable, the
2 applicant has established a schedule of
3 activities designed to eliminate the entrance of
4 toxic pollutants from nonindustrial sources into
5 such treatment works;

6 (7) there will be no new or substantially
7 increased discharges from the point source of
8 the pollutant to which the modification applies
9 above that volume of discharge specified in the
10 permit.

11 For the purposes of this subsection the phrase "the
12 discharge of any pollutant into marine waters" refers
13 to a discharge into deep waters of the territorial
14 sea or the waters of the contiguous zone, or into
15 saline estuarine waters where there is strong tidal
16 movement and other hydrological and geological
17 characteristics which the Administrator determines
18 necessary to allow compliance with paragraph (2) of
19 this subsection, and section 101(a)(2) of this Act.
20 A municipality which applies secondary treatment
21 shall be eligible to receive a permit pursuant to
22 this subsection which modifies the requirements of
23 subsection (b)(1)(B) of this section with respect to
24 the discharge of any pollutant from any treatment
25 works owned by such municipality into marine waters.
26 No permit issued under this subsection shall
27 authorize the discharge of sewage sludge into marine
waters. (33 USC 1311(h).

17 The federal law is clearly a water quality based standard, while
18 the state law is a technology based standard. Until the legislature
19 resolves this matter, this conflict will continue to exist with the
20 attendant results that one sees in this case.

21 Those results include requiring the City of Lynnwood to issue
22 \$35,923,000 of revenue bonds (Exhibit A-21) and pay an estimated
23 monthly residential sewage charge of \$55.61 in 1990, to install
24 secondary treatment. (Testimony of City expert witness John Maxwell
25 and Bill Clouter.) This figure exceeds the rate for a "high cost

1 project" under federal guidelines which is \$34.47 per month according
2 to DOE witness Chris Haynes. Yet the testimony before this Board, by
3 the City, is that there is no adverse effect on water quality from the
4 City's discharge without secondary treatment. The Department of
5 Ecology did not consider the water quality of Brown's Bay.

6 II REASONABLENESS

7 The Department of Ecology has chosen to define "reasonable" in
8 terms of three criteria: (1) the status of planning needed to proceed
9 to secondary treatment; (2) environmental siting constraints; and (3)
10 economic factors.

11 The City testified that site specific constraints exist at the
12 site of the treatment plant, slide conditions, noise, odor and land
13 constraints all increase the likelihood of environmental degradation
14 at the site. Evidence was presented that indicated there would be
15 increased risk of catastrophic damage to the Lynnwood plant site. The
16 site has suffered substantial slides in the past. One such slide left
17 the transmission line of all sewage in the plant dangling in the air
18 for some 50 feet. (Wims' testimony) testimony was that surrounding
19 property owners have complained and filed claims against the City for
20 damages from sliding which occurred during the latest construction
21 effort.

22 While I do not believe these problems are insurmountable, I do
23 think it will make secondary treatment must more expensive than
24 otherwise would be necessary at another site.

25 The City's appeal focused upon the siting constraints and economic

1 criterion. The Department of Ecology's economic criterion include a
2 variety of concerns, but the basic one was cost. What will the cost
3 of building a secondary treatment plant be? What will the cost of
4 operating a secondary treatment plant be? How will those costs affect
5 the City's sewer rate structure?

6 It is apparent from the record in this case that the weight of
7 economic testimony is on the side of Lynnwood. This is because it was
8 supported by the testimony of qualified experts as opposed to the
9 Department's witnesses. DOE's witnesses clearly did not have the
10 proper expertise to analyze the subject of user rates, investment
11 banking practices or economic forecasting.

12 For instance, DOE justified its user-rate analysis for the City of
13 Lynnwood on the basis of the administrative convenience of simply
14 updating the 1977 facilities plan estimates whereas the City's
15 user-rate analysis was based on more specific estimating techniques,
16 which were supported by professional expertise including that of an
17 investment banker and financial analyst with special expertise in
18 feasibility and financing of sewage treatment projects.

19 Further, despite the fact that EPA's financial guidelines provide
20 for states to examine the impact of sewage treatment projects to low
21 income users by comparing project costs with the ability of those
22 persons in the bottom quartile of income to pay, DOE did not perform
23 that analysis.

24 Finally, if DOE is to make judgments like this then they need to
25 be able to correctly estimate the costs of projects such as this by

1 including the following categories of cost; engineering, legal,
2 financial, contingency, overhead, interim interest expense, revenue
3 bond reserve, debt service, revenue bond coverage and sales tax.

4 III CONCLUSION

5 Secondary treatment is economically excessive and could cause
6 adverse environmental impacts (sludge disposal) without corresponding
7 benefits. Either of these problems is, in and of itself, sufficient
8 proof of the undue burden of secondary treatment for Lynnwood;
9 combined with the huge economic price tag of secondary treatment and
10 the resulting adverse environmental impacts without corresponding
11 benefits to water quality, beneficial uses and aquatic life, causes a
12 waiver denial to violate any standard of fairness.

13 The legislature will be disappointed, I think, to learn that in
14 enacting the water pollution laws, it was allowing a government agency
15 to force secondary treatment on communities regardless of the effect
16 on the quality of the marine receiving waters.

17 The point is that if primary treatment has no adverse effect on
18 the marine receiving waters as is the case in Lynnwood, then it should
19 be allowed to be discharged and the municipality should not be forced
20 to pay for secondary treatment.

21 I think the legislature's disappointment will continue unabated
22 when they discover that state law has removed the authority from this
23 Board to make that judgment, on a case-by-case basis.

1 For these reasons, I believe the law should be changed to allow
2 the quality of the receiving waters to be considered in determining
3 whether a municipal treatment plant discharging to marine waters needs
4 to install secondary treatment.

5 DATED this 4th day of October, 1985.

6
7  10/3/85
8 LAWRENCE J. FAULK, Chairman
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26 CONCURRING - FAULK
27 PCHB No. 84-206